No. 00-1683

Supreme Court, U.S.
FILED
JUL 9 2001
CLERK

IN THE

# Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL,

*Petitioner*,

—v.—

TIME WARNER, INC., TIME INC. MAGAZINE COMPANY and RICHARD BEHAR,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

FLOYD ABRAMS*
DEAN RINGEL
JANET A. BEER
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

*Attorneys for Respondents*

**Counsel of Record*

*Of Counsel*:

Robin Bierstedt
TIME INC.
1271 Avenue of the Americas
New York, New York 10020

38 pp

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to determine that a reasonable jury could not find statements at issue in this libel case to have been made with actual malice where defendant journalists relied upon (i) prior judicial rulings, affidavits and previously published articles and (ii) extensive interviewing of participants in the events described, when plaintiff repeatedly refused to discuss the statements it later claimed to be false and defamatory.

2. Whether the Court of Appeals properly applied *New York Times Co.* v. *Sullivan*, *supra*, in affirming the grant of summary judgment dismissing a libel claim with respect to a single sentence that it concluded was subsidiary in meaning to other nonactionable statements made without actual malice.

3. Whether in this diversity case, an effort by a public figure to secure adjudication of a libel claim without proof of actual malice by limiting the claim to "nominal damages" was properly presented by way of untimely motions under Rule 54(b) or later under Rule 15(a), Fed. R. Civ. P. where (i) no such claim had appeared in the complaint and (ii) granting the motions would have resulted in prejudice and delay and the asserted claim lacked a federal jurisdictional basis.

4. Whether, even if properly presented as a matter of procedure and subject matter jurisdiction, a public figure may, consistent with *New York Times Co.* v. *Sullivan*, *supra*, prosecute a libel action without proof of actual malice by limiting its claim to one for "nominal damages."

## LIST OF PARTIES BELOW

All parties appear in the caption of the case on the cover page.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows: AOL Time Warner Inc., a publicly held Delaware company, is the successor company to Time Warner Inc. Time Inc., a Delaware company, is the successor company to Time Inc. Magazine Company. Time Inc. is indirectly wholly owned by AOL Time Warner Inc. AOL Time Warner Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

## TABLE OF CONTENTS

Questions Presented ..... i

List of Parties Below ..... ii

Rule 29.6 Statement ..... ii

Table of Authorities ..... v

Counterstatement of the Case ..... 1

The Proceedings Below ..... 1

Facts ..... 5

Reasons for Denying the Writ ..... 9

Summary of Argument ..... 9

I. The Court of Appeals' Treatment of a Speaker's Belief in His Statement as Supporting the Absence of Actual Malice Is Consistent with This Court's Decisions and Presents No Conflict Among the Circuits ..... 11

A. The "Intimidation" Statements ..... 14

B. The Fishman Statements ..... 17

II. The Dismissal of a Statement Because It Was Subsidiary in Meaning to Statements Held to Have Been Made Without Actual Malice Does Not Conflict with This Court's Decision in *Masson* Nor with Decisions of Any Other Circuit ..... 21

III. This Court Should Not Entertain the Contention That a Public Figure Libel Plaintiff May Avoid the Actual Malice Requirement by Claiming Only Nominal Damages.....26

Conclusion .....30

## TABLE OF AUTHORITIES

### CASES

**Pages**

*Acha* v. *Beame*, 570 F.2d 57 (2d Cir. 1978) .....27

*Barrows* v. *Forest Laboratories, Inc.*, 742 F.2d 54 (2d Cir. 1984) .....28

*Baybak* v. *Time Warner Inc., et al.*, No. 92 Civ. 3041 (S.D.N.Y. filed April 27, 1992)..... 2-3

*Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980) .....27

*Fulani* v. *New York Times Co.*, 260 A.D. 2d 215, 686 N.Y.S.2d 703 (N.Y. App. Div. 1999) .....23n

*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).....29

*Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989) .....12, 13, 13n

*Herbert* v. *Lando*, 441 U.S. 153 (1979) .....30n

*Herbert* v. *Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986) ..... 23, 24, 25-26

*Jewell* v. *NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998) .....23n

*Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) .....10, 21, 23, 23n, 24

**Pages**

*Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535 (9th Cir. 1990), *rev'd*, 501 U.S. 496 (1991) ..... 10-11, 22, 24-25

*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) ..... *passim*

*Roberts* v. *Galen of Virginia, Inc.*, 525 U.S. 249 (1999) .....29n

*St. Amant* v. *Thompson*, 390 U.S. 727 (1968) .....12

*St. Paul Fire and Marine Insurance Co.* v. *Heath Fielding Insurance Broking Ltd.*, 976 F. Supp. 198 (S.D.N.Y. 1996) .....27

*Time Inc.* v. *Hill*, 385 U.S. 374 (1967) .....30

*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) ..... 27-28

**STATUTES**

28 U.S.C. § 1332 .....4

**RULES**

Federal Rules of Civil Procedure

Rule 15(a)..... i, 27
Rule 54(b)..... i, 3, 26-27

Local Civil Rule 3(j), S.D.N.Y. .....27

Respondents respectfully submit that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 12, 2001 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

## COUNTERSTATEMENT OF THE CASE

### The Proceedings Below

The cover article of the May 6, 1991 issue of *Time* Magazine was a report entitled "Scientology: The Cult of Greed" (the "Article") by *Time* Magazine reporter Richard Behar. (Article 50-57; A336-45)[1]

On April 27, 1992, Church of Scientology International ("CSI" or "Petitioner") commenced this libel action against Time Inc., its parent company Time Warner Inc., and Richard Behar, the author of the Article (collectively, "Time" or "Respondents"). (A1-29) CSI challenged six passages from the eight-page, 7,500-word Article, alleging that each of the passages had been published with actual malice (A13-14 ¶34), and sought "general damages in an amount to be determined at trial" and punitive damages of "no less than $416,000,000 . . . ." (A28 ¶74 *et seq.*) The complaint stated that "[t]his is an action for damages" (A2 ¶3) and identified a single "claim for relief" (A12).

In June 1992 Time moved to dismiss the complaint on the grounds that the statements, none of which mentioned CSI by name, were not about CSI but about Scientology generally, about individual Scientologists or about Scientology

---

[1] A copy of the Article with the passages challenged by Petitioner identified has been lodged with the Court. Citations in the form A__ are to the Joint Appendix filed below. Citations in the form App. __ are to Appendices A-F annexed to the Petition for Writ of Certiorari.

entities other than CSI. On November 23, 1992 the district court issued an opinion concluding that two of the six allegedly defamatory passages were not of and concerning CSI. (App. B 17a-35a) As to the other four passages, the district court held that CSI's "of and concerning" allegations were sufficient to withstand the motion to dismiss but that references in two of those four passages to the activities of individual Scientologists failed to satisfy the "of and concerning" requirement.[2] *Id.*

Respondents answered the complaint and Behar also asserted counterclaims against CSI for violation of the Fair Credit Reporting Act and harassment, alleging that CSI had waged a concerted campaign of intimidation against him while he was working on the Article. (A32-54)

The parties agreed in writing to defer discovery on issues of truth and falsity. (A134-37) Recognizing that Respondents intended to bring a motion for summary judgment based on CSI's inability to establish actual malice (CSI admitted it was a public figure), and acknowledging that that motion could bring the litigation to an end, the parties agreed to focus discovery initially on issues of actual malice and other matters that could be resolved without undertaking the necessarily expensive, time-consuming and (from CSI's perspective) sensitive discovery of church executives on truth and falsity. *Id.*

For the next two-and-a-half years, CSI conducted massive discovery of Respondents and third parties on actual malice issues. Behar alone was deposed for 28 days—16½ days in this action (App. A 39a n.1), and 11½ days in a companion suit brought by an individual Scientologist, *Baybak* v.

---

[2] All the statements originally put at issue in the complaint were set out by the Court of Appeals in its Opinion. (App. A 2a-5a) The statements at issue on appeal (some were abandoned by Petitioner on appeal) are identified at App. A 10a–13a.

*Time Warner Inc., et al.*, No. 92 Civ. 3041 (S.D.N.Y. filed April 27, 1992), with the understanding that the results of that questioning would also be available for use in this litigation (A135). Time produced over 20,000 pages of documentation, as well as notes and tapes of Behar's interviews for the Article. Thirteen other persons were deposed by CSI, including eight *Time* editors and researchers.

At the close of this discovery, Respondents moved for summary judgment on all remaining statements. The motion was supported by an affidavit from Behar attaching the various court decisions, affidavits, interview notes and other materials on which he had relied for the statements in question, as well as affidavits from other *Time* personnel involved in publishing the Article (A240-1330; A191-224). On November 14, 1995 the district court granted Respondents' motion as to all but one of the remaining allegedly libelous statements, holding that no reasonable jury could find that Time had published the statements with actual malice. (App. C 36a-50a) Following reargument, the district court granted summary judgment on July 16, 1996 as to the sole remaining statement, holding that it was subsidiary in meaning to the nonactionable views expressed in the remainder of the Article. (App. D 51a-66a)[3] On July 17, 1996, the court dismissed CSI's complaint. (A2823)

Over four months later, on November 26, 1996, CSI, now represented by new counsel, moved for an order pursuant to Fed. R. Civ. P. 54(b) modifying the district court's July 17, 1996 order to reinstate its libel claim as one for nominal

---

[3] The subsidiary meaning arguments were raised in the initial summary judgment motion and, in greater detail, in Respondent's Memorandum of Law on Reargument in Support of Defendants' Motion for Summary Judgment (Jan. 17, 1996), pp. 3-9, and Reply Memorandum of Law on Reargument (Jan. 31, 1996), pp. 1-2. The Petition is inexplicably in error in stating that the subsidiary meaning issue "had not been briefed or argued" prior to its adoption by the district court. (Pet. 3)

damages, which CSI proposed should be exempt from the actual malice requirement. After the district court denied the motion as an untimely attempt to reargue the summary judgment decisions (App. E 67a-78a), CSI moved for leave to amend its 1992 complaint by adding that same claim. The district court denied CSI's motion, because of unjustified delay and prejudice to defendants and because it would, in any event, be futile to allow amendment to assert such a claim because the court lacked subject matter jurisdiction over the claim in the absence of a pleading satisfying the jurisdictional amount under 28 U.S.C. § 1332 and because the claim was inconsistent with the requirements of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). (App. F 79a-89a)

To facilitate prompt appellate review, the parties entered into a stipulation voluntarily dismissing Behar's counterclaims without prejudice. Final judgment was entered and, on March 29, 1999, CSI filed a Notice of Appeal.

On appeal, CSI challenged, *inter alia*, the district court's ruling that various statements were made without the clear and convincing evidence of actual malice required under *Sullivan*. CSI urged that the *Time* reporter had purposefully avoided the truth because of his "extreme dislike" of Scientology. CSI conceded at oral argument, however, that what it claimed was the reporter's "extreme dislike" of Scientology was a belief held "in good faith." The following colloquy ensued:

> *The Court:* "But if he, if it's with good faith, what is wrong with that?"
>
> *Mr. Neuborne:* "Because the good faith can blind you to the truth."[4]

On January 12, 2001, the Court of Appeals entered its unanimous opinion and judgment, affirming the judgment

---

[4] Copies of the audiotapes of oral argument have been lodged with the Court.

below. (App. A 1a-16a) In addition to the grounds stated in his opinion for the Court, Chief Judge Walker noted separately his view that none of the references in the Article to Scientology or to individual Scientologists was "of and concerning" CSI. (App. A 8a n.1)

**Facts**

In mid-1990 Richard Behar, a reporter for *Time* Magazine, proposed to his editors that he prepare an article about Scientology and received authorization to proceed. (A201; A215-16; A245-46) Behar was familiar with Scientology as a result of writing a 1986 article about it for *Forbes* Magazine. (A242-44; A347-51)

Behar worked on the *Time* story for nearly a year. (A245-51) He interviewed approximately 150 sources, including many former high-ranking Scientologists (A248; A243; *see, e.g.*, A263-68), outside experts who followed Scientology, and scores of individuals who told him about its persistent abuse of members and critics (*see, e.g.*, A284; A297-305). He spoke with present and former government officials who had dealt with Scientology and with individuals and lawyers who had sued or been sued by one or another of its many entities (*see, e.g.*, A268-72; A286-87; A292-96).

Behar made a number of efforts to talk to Scientology officials, including David Miscavige, Scientology's highest official. Scientology officials uniformly refused to speak with Behar. (A247; A219-20; A2253-54; *see also*, A244)

Before publication, CSI's counsel Earle Cooley wrote to Time complaining about Behar and his prior report in *Forbes*. *Time*'s Chief of Correspondents, John Stacks, questioned Behar and satisfied himself that Behar could report with an open mind. (A216-17) Cooley's letter focused on a charge that a former Scientology tax attorney had used his position in the Department of Justice to terminate an IRS-inspired investigation of Scientology. (A383-84) Behar had

already told Cooley that he had concluded that the charge was probably unfounded. (*Id.*; A252-53) Stacks viewed Behar's willingness to discard charges against Scientology that appeared unfounded as evidence of Behar's professionalism. (A216-17) (The charge was not reported. (A253))

Behar's editors viewed his prior reporting positively since it indicated that he had a base of knowledge and an array of contacts who could assist him in reporting on a secretive organization. (A201-02; A215-16) At his deposition, Stacks explained his view that "[a] reporter is not . . . disabled because he has, based on his investigation, formed some opinions. A contrary rule would lead to reporting only by the ignorant." (A218; *see also,* A2253-54; A2260)

Behar reviewed many affidavits from litigations involving Scientology, a large number of court rulings discussing Scientology, and dozens of published books and articles describing Scientology's harassment and abuse of its members, critics and others. (A247-48; *see, e.g.*, A255-307; A390-1226) He amassed over 20,000 pages of documents about Scientology—nearly six feet of files. (A247-48)

In one judicial opinion that Behar reviewed, for example, a California Superior Court determined that defectors from Scientology know "that the Church or its minions is fully capable of intimidation or other physical or psychological abuse if it suits their ends. The record is replete with evidence of such abuse." *Church of Scientology of California* v. *Armstrong*, No. C 420153, slip op. at 7-8 (Cal. Super. Ct. June 20, 1984). (A360) The court made specific credibility findings that the testimony of defectors (a number of whom were Behar's sources) was "credible" and "extremely persuasive" and that "their testimony was precise, accurate, and rang true." (A359)

Behar's pre-publication files contain a host of statements, many made under oath, attesting to efforts by Scientology to threaten critics, adherents, lawyers, judges and others with

physical harm (including death); frame them for crimes; or spread false and defamatory rumors about them.[5] (*See*, *e.g.*, A263-83; A643-868; A969-70; A942-51; A953-61; A904-12.) As one example, Behar knew that Vicki Aznaran, former President of Scientology's Religious Technology Center ("RTC"), had sworn in an affidavit that Scientology routinely engaged in "burglaries, assaults, disruption of enemies' businesses, spying, harassive investigations, abuse of confidential communications in parishioner files and so on." (A646)

Aznaran's affidavit also stated that attacks on its enemies were part of Scientology "scripture" and that Scientology founder L. Ron Hubbard had "encourage[d] Scientologists to pursue litigation purely for harassment without regard to the merits of a claim to cause enemies to fold" and had also written that "[t]he law can be used very easily to harass, and . . . will generally be sufficient to cause [the enemy's] professional decease. If possible, of course, ruin him entirely." (A264; *see* A643-50; A658)

Behar also knew that another former high-ranking Scientology official, William Franks, had sworn that he had "personal knowledge" of many orders issued by Hubbard concerning Michael Flynn (an attorney who had represented victims of Scientology in litigation against the Church):

> "Hubbard ordered him to be totally ruined. We were ordered to do a complete investigation of Flynn, find

---

[5] Behar was aware that the church regularly harassed journalists who criticized it. (A301-06) He experienced the church's tactics as the Article was being prepared. As is reported in a sidebar accompanying the Article, entitled "The Scientologists and Me" (Article 57), Behar was subjected to harassment, including surveillance by private investigators and illegal acquisition of his credit report; his neighbors and acquaintances were questioned about him; and private investigators contacted Behar posing as victims of Scientology in an effort to elicit negative statements. (A251-54; A306-07) Behar's report of these incidents was not challenged by Petitioner in its complaint.

> or '*manufacture*' crimes he had committed, expose his 'crimes' to his clients and to law enforcement officials, ruin his law practice, have him disbarred and file numerous law suits or bar complaints against him without regard to whether the complaints were meritorious or not." (A732, emphasis in original)

Having read this strongly worded and remarkably consistent criticism of Scientology, and having experienced Scientology's efforts to harass and intimidate him, Behar believed—and relied upon—the numerous sources who told him of specific instances of intimidation, harassment, falsification and other misconduct by Scientology.

The Article is highly critical of Scientology itself and of the activities of a number of individual Scientologists. (CSI is named only once in the Article. *See* Article 56.) Scientology officials responded forcefully to the Article. They issued an 80-page rebuttal, which they sent to church members, business leaders and political figures. (App. C 38a n.1) They published many pages of advertisements in *USA Today*, including a 27-page advertising supplement, challenging the Article and denouncing *Time*. (*Id.;* A2422) They brought suits against various individuals quoted in the *Time* article. Finally, the day before the statute of limitations would have run, CSI commenced this action. (A1-29)

CSI's lawsuit challenges only a few statements—some quite narrow—contained in the eight-page Article.[6] The

---

[6] Many of the Article's most far-reaching charges are contained in passages that CSI did *not* challenge, including statements that:

- Scientology is "The Thriving Cult of Greed and Power. Ruined lives. Lost fortunes. Federal crimes. Scientology poses as a religion but is really a ruthless global scam—and aiming for the mainstream." (Article 50)
- Scientology, according to one of its former key leaders, "'is a criminal organization, day in and day out, [that] makes Jim and Tammy [Bakker] look like kindergarten.'" (Article 51)

Footnote continued on next page.

statements originally challenged are set out in the opinion of the Court of Appeals at App. A 2a-5a; those that were at issue on appeal are identified at App. A 10a-13a.

## REASONS FOR DENYING THE WRIT

### Summary of Argument

None of the three questions assertedly presented for this Court's review reflects a conflict within the circuits. No circuit conflict is even claimed. Nor does the Court of Appeals' decision depart from this Court's libel teachings. Each of the issues purportedly raised was decided correctly below. And

---

Footnote continued from previous page.

- Paulette Cooper, author of a book critical of Scientology, was the target of "a Scientology plot (called Operation Freak-Out) whose goal, according to church documents, was 'to get P.C. incarcerated in a mental institution or jail'" and "by impersonating Cooper, Scientologists got her indicted in 1973 for threatening to bomb the church." (Article 57)
- "in the end, money is what Scientology is all about. As long as the organization's opponents and victims are successfully squelched, Scientology's managers and lawyers will keep pocketing millions of dollars by helping it achieve its ends." (Article 57)

Even in the broadest passages quoted by CSI in its complaint, CSI did not challenge the highly critical passages that are italicized:

- "In reality the church is *a hugely profitable global racket* that survives by intimidating members and critics in a Mafia-like manner." (Article 50)
- "Says Cynthia Kisser, the [Cult Awareness] network's Chicago-based executive director: 'Scientology is quite likely the most ruthless, the most classically terroristic, *the most litigious and the most lucrative* cult the country has ever seen. *No cult extracts more money from its members.*'" (Article 51)
- "Those who criticize the church—journalists, doctors, lawyers and even judges—often find themselves *engulfed in litigation, stalked by private eyes*, framed for fictional crimes, beaten up or threatened with death." (Article 56)

at least two of the three issues identified by the Petition are not properly before this Court at all.

First, the challenge to the conclusion below that CSI had failed to establish the "actual malice" required for public figures in *Sullivan* libel cases is rooted in a misstatement of the Second Circuit's opinion as to the relevance of alleged "bias." The Court of Appeals did not state, as the Petition contends, that a defendant's "bias 'and even his exaggerations, enhances, rather than diminishes, the likelihood that' his defamatory statements were made without actual malice. (App. A, 10a)." (Pet. 18) Rather it, like the district court, concluded—unexceptionally—that a libel defendant's "'*belief in his statements*, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected.'" (App. A 10a, quoting App. C 40a) The Petition's omission of the italicized words from the Second Circuit's opinion distorts the Court of Appeals' meaning, for the belief in the truth of one's words is the antithesis of actual malice under this Court's holdings in *Sullivan* and its progeny. The Petition can cite no circuit authority suggesting that such belief can constitute a basis for actual malice, and the question Petitioner would have this Court decide is presented only through this distorted quotation.

Second, the Petition suggests that the Second Circuit's unwillingness to find subsidiary meanings independently actionable conflicts with this Court's rejection of the so-called incremental harm doctrine in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). In fact, however, Judge Kozinski's dissenting opinion in the Ninth Circuit in *Masson*, vindicated in this Court's subsequent opinion, expressly evaluated the Second Circuit's subsidiary meaning approach and concluded that it is "very different" from the incremental harm doctrine which it (and, later, this Court) found to be without constitutional roots. *Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535, 1565-66 (9th Cir. 1990) (Kozinski, J., dissenting), *rev'd*, 501 U.S. 496 (1991). Judge Kozinski

recognized, as had the Second Circuit, that it is "quite unexceptional" to determine that statements that imply the "identical view" to those already found to have been made without actual malice, are nonactionable. *Id.* at 1565.

Finally, the most far-reaching of Petitioner's positions, the assertion that this Court should endorse a new libel cause of action for nominal damages wholly exempt from the fault requirements of *Sullivan*, is not properly presented here at all. It was correctly rejected by the district court not only on the merits as inconsistent with this Court's holding in *Sullivan*, but also on procedural grounds as untimely under the local rules governing reargument and as likely to cause delay and prejudice. The district court also declined to exercise jurisdiction over this newly asserted and novel state-law claim that lacked the requisites of federal diversity jurisdiction.

## I.

## The Court of Appeals' Treatment of a Speaker's Belief in His Statement as Supporting the Absence of Actual Malice Is Consistent with This Court's Decisions and Presents No Conflict Among the Circuits

The Court of Appeals' application of the actual malice standard was central to its disposition of the entire appeal below since each of the statements at issue was held to have been properly dismissed for lack of the clear and convincing proof of actual malice required by this Court's decisions in *Sullivan*, or because the statement was "subsidiary in meaning to statements made without actual malice." (App. A 16a)

The Petition contends that *Time* reporter Richard Behar harbored bias against Scientology and that the Court of Appeals held that

> "Behar's anti-Scientology bias 'and even his exaggerations, enhances, rather than diminishes, the likelihood that' his defamatory statements were made without actual malice. (App. A, 10a)." (Pet. 18)

The Petition labels this an "astonishing conclusion." *Id.* But that is not what the opinion of the Court of Appeals said. Rather, the Court of Appeals quoted with approval the district court's statement that

> "the 'speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected.'" (App. A 10a)

The court's focus on the "speaker's belief in his statements" (words omitted from the Petition's quotation) fairly reflects this Court's teachings as to the meaning of actual malice. One who has a belief in his statement is one who has not acted with either knowledge of falsity or "serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). As *Sullivan* itself recognized in defining actual malice, the key question is whether the statement constitutes "what the defendant believes to be truthful information . . . ." 376 U.S. at 280-81. The Court of Appeals' opinion does not depart from this Court's teachings.

The question of Behar's beliefs arose in the context of Petitioner's claim that Behar was "biased" against Scientology and had fixed views that precluded him from perceiving the truth. It was also argued that Behar's alleged bias (which no court below held actually existed) led him to purposefully avoid the truth. *See Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989).

One person's "bias," of course, is another's belief based on facts he or she has learned. Here, Petitioner itself acknowledged to the Court of Appeals that Behar's beliefs about Scientology were held in "good faith." (*See* p. 4 above.) Such "good faith" belief is, in and of itself, inconsistent with actual malice.

As the Court of Appeals noted, the district court entertained the possibility that bias could be relevant in advancing a claim of purposeful avoidance of the truth in the reporting process. (App. A 10a) But the factual predicate needed to

embark on such analysis was lacking here, for as the courts below noted, "'plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof' . . . ." (App. A 10a, quoting App. C 41a) Absent factual circumstances like those in *Harte-Hanks*, the strongly held beliefs CSI ascribed to Behar simply did not begin to raise an issue of actual malice.[7]

The Court of Appeals did not simply rest on that general principle in affirming the absence of actual malice here. It engaged in a review of the specific allegations of actual malice with respect to the individual statements at issue. That review rebuts Petitioner's contention that sufficient evidence of actual malice had been presented (Pet. 22), whatever the treatment of Behar's "beliefs."

---

[7] In *Harte-Hanks* this Court found purposeful avoidance where the media defendant had published (1) a "highly improbable" story of bribery in the context of a judicial election (2) based upon an admittedly questionable source despite (3) unambiguous denials given by the plaintiff in a personal interview and (4) denials as well by *all* other witnesses who were interviewed (there were five); where (5) the one witness the reporters were not instructed to interview was in the best position to confirm or deny the source's account of the events, (6) she had been readily available and (7) her denial would have demonstrated convincingly that the story was false; and where (8) the defendant had failed to review two readily available audiotapes of the events at issue, which could easily have verified or disproved the allegations; and where (9) defendant publisher endorsed plaintiff's opponent in the judicial election. *Harte-Hanks*, 491 U.S. at 660, 682, 691-92.

*Time*'s extensive research, including judicial decisions, affidavits, previously published reports and interviews of sources whom Behar credited and whose accounts were both mutually supportive and wholly consistent with prior reported conduct on the part of Scientology, is precisely the opposite of the *Harte-Hanks* account. The purposeful avoidance contention is particularly weak coming from an organization that consistently refused to answer the questions of a reporter it now accuses of having purposefully avoided the truth.

The Petition refers to "general charges that CSI's leadership operates in a 'mafia-like,' 'terrorist' way to fleece credulous people of their money." (Pet. 5) It then describes two "specific examples of alleged misbehavior": (1) allegations that Scientology ordered Steven Fishman to murder his therapist and then commit suicide in order to cover up CSI's alleged involvement in a fraudulent plan to use forged stock-confirmation slips to participate in class action recoveries, and (2) allegations that Scientology had financially squeezed Noah Lottick until he was destitute and then abandoned him to suicide. (*Id.*)

In its discussion of actual malice, the Petition refers only to Fishman, apparently by way of example. (Pet. 22-24) We, like the Court of Appeals, first address what CSI labels the "general charges" and then turn to the Fishman example discussed in the Petition.

**A. The "Intimidation" Statements**

The broadest statements at issue in this lawsuit—referred to in the Petition as the "general charges" (Pet. 5)—were those quoted in paragraph 40 of CSI's complaint:

> "'[T]he church . . . survives by intimidating members and critics in a Mafia-like manner.'"
>
> * * *
>
> "'Scientology is quite likely the most ruthless, the most classically terroristic . . . cult the country has ever seen.'"
>
> * * *
>
> "'Those who criticize the church—journalists, doctors, lawyers and even judges—often find themselves [. . .] framed for fictional crimes, beaten up or threatened with death.'" (A14-15 ¶ 40, quoting Article 50, 51, 56)

Behar's belief in the statements at issue was supported by a mass of information about Scientology's harassment and

intimidation of its members and critics. The dozens of specific examples that were known to Behar and that supported his belief in the truth of the statements are described in detail in his affidavit in support of summary judgment and the attached exhibits (A240-333; A335-1330).

In addition to the stinging description of a church capable of "intimidation or other physical or psychological abuse" that appears in the California Superior Court's *Armstrong* decision (discussed at p. 6 above) and an English court's comparison of Scientology's tactics to those of "Hitler and his henchmen," *In re: B and G (Wards)*, [1984] F.L.R. 134, 38-39, 46 [Family Division] (A492-93), Behar reviewed decisions from other courts that had, after conducting hearings, reached similarly harsh conclusions about Scientology's intimidation of its critics and dissidents.

One example was the decision in *Wollersheim* v. *Church of Scientology of California*, 260 Cal. Rptr. 331 (1989) (A390-413), a case brought by a former Scientologist, which found that Scientology intimidated its perceived enemies through psychological coercion, physical restraint and

> "a practice of retribution and threatened retribution—often called 'fair game'—against members who left or otherwise posed a threat to the organization. . . ." (A394)

> "In the instant case, at least, the prime focus of the 'fair game' campaign was against the 'heretic' Wollersheim's economic interests. . . . Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically." (A400-1)

The court also credited Wollersheim's testimony that Scientology had continued to use "fair game" practices notwithstanding the church's public rejection of the policy. (A403) Wollersheim was also, according to the court, held "captive"

and forced to take part in Scientology activities "under threat of physical compulsion." (A404)

Behar reviewed other decisions that described Scientology's total disregard for the law in its campaign against its enemies. One court determined that the Church of Scientology had "filed false tax returns, burglarized IRS offices, stole[n] IRS documents, and harassed, delayed and obstructed IRS agents who tried to audit [its] records." *Church of Scientology* v. *C.I.R.*, 83 T.C. 381, 505 (1984). (A513)

Behar also relied on sworn statements submitted in court by a number of high-ranking Scientologists who had defected from the church (some of which are discussed at pages 7-8 above). (A263-68; A643-50; A661-62; A730-37; A754-812)

Behar's identification of four groups of critics who suffered at the hands of the Scientology movement—journalists, doctors, lawyers and judges—was supported by a wealth of information recognized in the decision below. (App. A 10a-11a) The various examples of mistreatment of each of these groups—threats, "frame-ups" and abuse—all known to Behar prior to publication, amply support the statement relating to critics of Scientology that is quoted in paragraph 40 of CSI's complaint.

They provide, as well, additional support for the other two statements challenged in paragraph 40, *i.e.*, the conclusion that Scientology "survives by intimidating members and critics in a Mafia-like manner" and the quoted opinion of Cynthia Kisser, head of the Cult Awareness Network, a cult monitoring group, that Scientology is "quite likely the most ruthless [and] terroristic . . . cult the country has ever seen." Other explicit support for these characterizations was known to Behar from an interview with former Clearwater, Florida mayor Gabriel Cazares and from the sworn trial and deposition testimony of a former Scientology member and its former lawyer. (A285-87; A268-69, n.14)

Petitioner's inability to deal with statements it describes as "general charges," and the evidence supporting them, reflects a continuing effort by CSI to wrench the overall actual malice analysis from the factual context in which it arises.

**B. The Fishman Statements**

CSI challenged two paragraphs of the Article describing "a Scientologist's business antics" which "had land[ed] him in jail":

> "Occasionally a Scientologist's business antics land him in jail. Last August a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock-confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action lawsuits. Fishman made roughly $1 million this way from 1983 to 1988 and spent as much as 30% of the loot on Scientology books and tapes.
>
> "Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Fishman was ordered by the church to kill Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide." (Article 55)

The district court noted that much of the Fishman passage was not of and concerning CSI. (App. B 29a)[8] The court accepted the possibility, however, that a reference to "the church" in a sentence concerning a claim by Fishman and Dr. Geertz could be understood to mean CSI. *Id.* Even

---

[8] Failure to satisfy the "of and concerning" requirement provides an alternative basis for disposition of CSI's claims. See App. A at 8a, n.1.

if it were assumed that "church" here refers to the CSI, Behar plainly lacked actual malice in describing this incident.

Behar reported "claims" concerning the church, which he explicitly attributed to Fishman and to Dr. Geertz. He had interviewed each of them and found them to be credible. (A326-27; *see generally*, A317-28; A150-51) Behar also relied on Dr. Geertz's sworn testimony at Fishman's sentencing hearing, where Dr. Geertz had stated that Fishman revealed in hypnosis sessions in 1990 that Scientology had ordered him to kill Dr. Geertz and do an "EOC"—end of cycle—which he understood to mean commit suicide. Dr. Geertz had taken this threat seriously and reported it to the FBI. (A319-21; A1169-70; A1177) This is the death threat and suicide order that Behar referred to in the Article.

Dr. Geertz had testified about having treated Fishman over more than twenty years, often through the use of hypnosis. (A320; A1142-44) He noted Fishman's continuing ties with Scientology while under his care, Scientology's hostility to psychiatrists and psychologists, and Scientology's efforts to undo Dr. Geertz's work with Fishman. (A320; A1143; A1148-51; A1153-55; A1157-58)

Behar had reviewed Dr. Geertz's resume, which describes in detail his impressive training, experience, awards and published works. (A319-20; A1270-78) Behar knew that U.S. District Judge Lowell Jensen had accepted Dr. Geertz as a qualified forensic psychologist. (A319; A1142) Aware of Fishman's schizophrenia, Behar credited Fishman's account of the death threat and suicide order in large part because of Dr. Geertz's ability, based on his decades of experience, to distinguish what was real from what was not in Fishman's statements. (A323; A326-27; A151-52) Dr. Geertz told Behar that Fishman was telling the truth about the EOC and death threat order in 1990. (A323; A150)

Petitioner argues that Behar knew the references to a death threat and EOC were false because he knew that Fish-

man had earlier pleaded guilty to obstruction of justice after having set up a phony death threat. Behar did not believe that Fishman's guilty plea undermined Dr. Geertz's testimony. (A321 n.47; A323-24) The death threat that had led to the obstruction of justice conviction had occurred earlier, in 1988, and involved a purported threat against Fishman's defense lawyer, Nurik, in the stock scam case. When interviewed, Nurik told Behar that it was his view that the clumsily contrived threat had been hatched "in conjunction" with Scientology to sabotage Fishman's defense in the stock scam case and that Fishman had purposely undermined his own defense to protect the church from involvement. (A673-74; A321 n.47) The death threat and EOC instruction reported by Time occurred more than a year and a half later, in 1990.

Dr. Geertz did not take seriously the earlier threats, but he believed the 1990 threats. (A320-22; A1169-70) Behar credited Dr. Geertz's insight, gained through years of treating Fishman, as to the reality of the different threats. (A323) Behar also recognized that the whole pattern was strikingly similar to other convoluted Scientology plots to frame those who posed trouble for the church.[9]

Behar also spoke with the federal prosecutor, Robert Dondero, about Scientology and Fishman. (A324) Dondero noted that Scientology had denied that Fishman had had more than a brief involvement with the church, but acknowledged that Dr. Geertz had said the tie between Fishman and

---

[9] Behar knew of elaborate schemes established by Scientology to frame others (for example, author Paulette Cooper, lawyer Michael Flynn and Clearwater Mayor Gabriel Cazares, each of whom had been framed for alleged criminal wrongdoing after criticizing the church). (Cooper: A301-02; A946; A830; Flynn: A265-66; A293-94; A438; A732; A947; Cazares: A278-79; A824; A830; A956) Suicide by Scientology adherents also was an omnipresent issue. Behar was familiar with reports of suicides of loyal Scientologists in the U.S. and abroad, including that of Noah Lottick, reported on in the Article.

the church went back many years. (*Id.*) Behar spoke with others who confirmed Dr. Geertz's statement and disputed Scientology's statement, upon which Dondero had relied, about the brevity of Fishman's Scientology involvement. Vicki Aznaran, a prominent Scientology defector, confirmed that Fishman had been a Scientology member around 1978 when she joined. (A324; A667) Aznaran's view was supported by Dr. Richard Ofshe, a sociologist who studied cult behavior and worked with the Fishman defense. (A324-25; A723-24) In Behar's mind, by contradicting the basic claim Scientology had made to prosecutor Dondero—that Fishman was a recent, neophyte member—these sources undermined Scientology's denials to Dondero. (A324-26; A706)[10]

Everything that Behar reported about the EOC and death threat was corroborated by Dr. Geertz, who was in the best position to observe Fishman and to evaluate his claims. Fishman's counsel, Nurik, gave his view that his client had purposefully undermined his own defense to aid Scientology. Dr. Ofshe and Vicki Aznaran confirmed a key aspect of Fishman's claim: his long-term involvement with Scientology. Scientology itself refused to speak with Behar, denying him the opportunity to discuss the Fishman and Geertz claims with church officials.[11] In the world of Scientology with which Behar was familiar, where frame-ups have a long history, where preying on those with psychological problems

---

[10] CSI's emphasis on Dondero's response to Fishman's statement that Scientology had murdered three people (Pet. 24) is based on portions of the transcript that Behar simply did not have. (A319 n.45; A147-48) It also misses the point with respect to Fishman's reliability: There is an obvious difference in significance between reliance on what Fishman had heard from others about what Scientology had done to third parties and reliance on what Fishman knew Scientology had done to him.

[11] CSI's lawyer, in a December 18, 1990 letter to Time, could be understood to deny any link to Fishman's stock scam (although the letter curiously stops short of saying so), and this was reported in the Article. (A1282-83; Article 55)

is a way of life, and where sustained intimidation and abuse of critics is the rule and not the exception, Fishman and Geertz's account is one that Behar had every reason to credit.[12] Behar believed Geertz and Fishman, and the courts below correctly concluded that CSI could not demonstrate that the Fishman statement was published with actual malice.[13]

## II.

## The Dismissal of a Statement Because It Was Subsidiary in Meaning to Statements Held to Have Been Made Without Actual Malice Does Not Conflict with This Court's Decision in *Masson* Nor with Decisions of Any Other Circuit

It is the central contention of the Petition with respect to the Court of Appeals' reference to the "subsidiary meaning" approach that this doctrine is identical to the "incremental harm" doctrine held not to be constitutionally mandated in *Masson* v. *New Yorker Magazine*, 501 U.S. 496. But the

---

[12] CSI argues that Behar did not speak to the FBI agents who investigated Fishman's stock scam or review affidavits submitted in the criminal case because of "'a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [his] charges.'" (Pet. 24) The question was whether Scientology had given orders to Fishman concerning a death threat against Dr. Geertz and suicide. The crucial people who knew the answer to that question were Fishman, Geertz and Scientology officials. Behar spoke to Fishman and Geertz; Scientology refused to talk to him.

[13] Although the Petition refers to the Noah Lottick statements as the second example of the "general charges" that the Article makes (Pet. 5), it does not discuss the evidence considered by the Court of Appeals in affirming the district court's judgment as to the lack of actual malice. The report of Noah Lottick's suicide was based on Behar's extensive interviews of Noah's parents and friends. The Scientology official Behar sought to interview would not speak with him. *See* App. A 12a-13a.

Second Circuit itself, in this and an earlier decision, made plain that the subsidiary meaning doctrine, rooted in the actual malice standard, differs in a fundamental way from the reputation-focused incremental harm doctrine. (App. A 13a-14a) And Judge Kozinski, whose dissent in the Ninth Circuit's *Masson* decision foreshadowed this Court's ultimate rejection of incremental harm as a constitutional requirement, considered the subsidiary meaning doctrine, compared it to incremental harm and found the former to be "very different, and quite unexceptional . . . ." 895 F.2d at 1565.

In this case, the Court of Appeals, having considered the overwhelming evidence that Behar lacked actual malice with respect to the "larger thrust" of the Article, *i.e.*, that "'Scientology, rather than being a bona fide religion, is in fact organized for the purpose of making money by means legitimate and illegitimate'" (App. A 15a, quoting App. D 65a), declined to permit the suit to continue with respect to a statement that was "subsidiary in meaning," *i.e.*, that "[o]ne source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world." (App. A 3a, 13a-16a)

The Court of Appeals did not reach either ground, but might well have dismissed this claim on the grounds that the statement was neither defamatory of CSI[14] nor published

---

[14] The "one source of funds" statement, which appears in a sidebar accompanying the Article, states that the Vancouver Stock Exchange ("VSE"), *not* CSI, is "notorious" and "often called the scam capital of the world." (Article 54) Other statements in the sidebar charge that individual Scientologists (not CSI) "take over companies, hype the stock [and] sell their shares." (*Id.*) The sidebar levels charges at individual Scientologists, who were free to bring their own legal claims (and one did). It did not defame CSI.

with actual malice.[15] Both arguments were presented to the Court of Appeals and would provide independent bases for dismissal.

In affirming the dismissal of the Vancouver Stock Exchange claim, the Court of Appeals applied its own prior decision in *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986), which held that

> "when a 'published view' of a plaintiff is not actionable as libel, other statements made in the same publication are not 'actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery.'" (App. A 13a, quoting, in part, 781 F.2d at 312).

The Second Circuit explicitly recognized that in *Masson* this Court rejected the idea that the incremental harm doctrine was constitutionally compelled.[16] (App. A 13a) The

---

[15] It is undisputed that Michael Baybak and Kenneth Gerbino, the focus of the discussion in the sidebar, made money on the VSE and that they made substantial contributions to Scientology. Behar knew that Baybak and Gerbino, both prominent Scientologists, were each included in a list of "Patrons" who had contributed $40,000 or more to the International Association of Scientologists which Behar had reviewed prior to publication of the Article (A329-30; A1289). Behar had considerable evidence, as well, that Baybak and Gerbino were investing in and serving as officers and/or directors of companies listed on the VSE. Behar had ample reason for his belief that Baybak's and Gerbino's dubious activities on the VSE helped fund the substantial contributions they made to Scientology, and the statements made in the sidebar were made without actual malice.

[16] The states of course remain free under *Masson*, *supra*, 501 U.S. at 523, to adopt the incremental harm doctrine, and the doctrine has been recognized under New York law. *Jewell* v. *NYP Holdings, Inc.*, 23 F. Supp.2d 348 (S.D.N.Y. 1998); *Fulani* v. *New York Times Co.*, 260 A.D.2d 215, 686 N.Y.S.2d 703 (N.Y. App. Div. 1999). This ground, also urged on the Second Circuit here, would provide a separate state-law basis for decision.

incremental harm doctrine was described by this Court as turning on whether certain reputation-damaging statements were nonactionable and "then undertak[ing] a factual inquiry into the reputational damage caused by the remainder of the publication." *Masson*, 501 U.S. at 523. As the Second Circuit recognized, this Court's rejection was premised on the fact that "[t]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not." (App. A 14a, quoting *Masson*, 501 U.S. at 523)

The subsidiary meaning doctrine, by contrast, is expressly intended as a "gloss on constitutional actual malice." (App. A 13a) If a defendant lacks actual malice as to a central meaning, it also lacks actual malice in publishing statements implying the same or subsidiary meanings.

This was precisely the view of Circuit Judge Kozinski in his dissent in *Masson*, 895 F.2d at 1565-66, cited approvingly by this Court. Judge Kozinski recognized that in *Herbert*, 781 F. 2d at 311, the Second Circuit explicitly distinguished the incremental harm doctrine from subsidiary meaning, referring to the latter as "a reasoned and different ground . . . ."[17] Judge Kozinski recognized that *Herbert* had applied an approach different from the incremental harm doctrine that he (and subsequently this Court) rejected:

> "The holding of *Herbert* is in fact very different, and quite unexceptional: The court concludes that if the defendants' published view that Herbert lied about re-

---

[17] At several points in the Petition an effort is made to blur this distinction, recognized by judges in both the Second and Ninth Circuits. The Petition suggests that the subsidiary meaning, incremental harm, substantial truth and libel-proof doctrines are all identical and indistinguishable. (Pet. at 10-11 and nn. 4-6) Subsidiary meaning is not identical to these other doctrines, as even a close reading of the cited portions of the Petition reflects.

> porting war crimes is not actionable, then other statements merely implying the identical view are not actionable either. *Id.* at 312. This is a far cry from saying, as does the majority, that *any* statement in a publication cannot be defamatory if the publication already contains a statement that is equally defamatory but unactionable, even if on an entirely different subject." *Masson,* 895 F.2d at 1565-66 (emphasis in original).

The Petition cites no cases rejecting this analysis or the subsidiary meaning doctrine, or suggesting that any conflict exists among the Circuits or with decisions of this Court.

And though the Petition now takes issue with whether the statement relating to the Vancouver Stock Exchange was in fact subsidiary in meaning to the "general charges" (Pet. 5-6) held to have been published without actual malice, going so far as to call the statements "unique" (Pet. 17), the fact is that in the courts below Petitioner conceded just the opposite, identifying the allegedly defamatory Vancouver Stock Exchange statement as one of three "specific instances" of a broader claim of unlawful activity by church leaders. Petitioner stated below:

> "Defendants analogized the Church to a criminal conspiracy, explicitly characterizing it as 'mafia-like,' 'classically terroristic,' and prone to systematic acts of violence, blackmail, and extortion. Defendants then purported to provide specific instances of unlawful activity by church leaders, including: *(1) false allegations of improper securities trading on the Vancouver Stock Exchange*; . . . ." Plaintiff's Memorandum of Law in Support of Motion to Modify Order Dismissing Plaintiff's Claims in Their Entirety, at 4 (Nov. 26, 1996). (emphasis added)

Here, as in *Herbert*, the statements "are simply an outgrowth of and subsidiary to those claims upon which it has been held

there can be no recovery." *Herbert,* 781 F.2d at 312. The subsidiary meaning approach applied below does not "expand First Amendment protection beyond the contours defined in *Sullivan.*" (Pet. 14) As the Court of Appeals recognized, it "is merely a gloss on constitutional malice . . . ." (App. A 13a) This application of the actual malice requirement provides no question worthy of this Court's review.

## III.

## This Court Should Not Entertain the Contention That a Public Figure Libel Plaintiff May Avoid the Actual Malice Requirement by Claiming Only Nominal Damages

Petitioner asserts that this Court should adopt a rule permitting a public figure libel plaintiff to avoid the actual malice requirement this Court has applied since *Sullivan* by limiting its claim to nominal damages. This question is not properly presented by this case. And, even if it were not procedurally inappropriate, the Petitioner's approach, one flatly inconsistent with this Court's prior decisions and not endorsed by any lower court, does not warrant this Court's review.

Even if there were reason to consider whether to permit a public figure libel plaintiff to avoid the rigors of actual malice by pleading a claim strictly limited to nominal damages, this Petition does not present such a case. CSI's complaint alleges a single claim for relief, states that "this is an action for damages" and seeks both compensatory damages to be determined at trial and punitive damages of "no less than $416,000,000." Only after years of discovery on actual malice and after summary judgment had been granted dismissing the complaint in its entirety did CSI decide that it really sought only nominal damages after all. Recognizing the need for judicial intervention to permit such a claim to proceed, CSI first brought a motion under Rule 54(b) to modify

the Court's dismissal and then a motion under Rule 15(a) to amend its complaint. Both motions were denied. These discretionary denials by the district court provide a sufficient basis to deny the Petition.

A district court's refusal to modify an interlocutory order under Rule 54(b) is reviewed only for abuse of discretion. *Acha* v. *Beame*, 570 F.2d 57, 63 (2d Cir. 1978); *cf. Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980) (decision to certify under Rule 54(b) left to the discretion of the district court).

The district court properly analyzed CSI's November 1996 Rule 54(b) motion for what it was—a procedurally defective motion for reargument made months after the court's initial summary judgment decision. (App. E 71a) CSI's attempt to reargue was denied for two reasons: First, CSI improperly sought reconsideration of the summary judgment order in light of a new theory not previously argued. *St. Paul Fire and Marine Insurance Co.* v. *Heath Fielding Insurance Broking Ltd.*, 976 F. Supp. 198, 202 (S.D.N.Y. 1996) (internal quotations omitted) ("reargument is not a forum for new theories or for plugging the gaps of a lost motion with additional matters"). (App. E 72a-73a) Second, the motion was untimely under the district court's Local Civil Rule 3(j) (now Rule 6.3), which required that such a motion "be served within ten (10) days after the docketing of the court's determination of the original motion . . . ." (App. E 73a)

The district court was also well within its discretion in rejecting CSI's 1997 attempt to amend its 1992 complaint to assert a new claim that was based entirely on the same facts that CSI asserted when it commenced this suit. "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). As justification for its nearly five-year delay, CSI offered only that its "understanding of its legal position"

changed "dramatically" when the court dismissed its libel claim entirely and that the idea of proposing a claim for nominal damages that would not require proof of actual malice was developed only after CSI had engaged new counsel following that dismissal. (A2843)[18] The district court, noting "the weight of authority," properly concluded that this was not sufficient justification. (App. F 83a-84a) *See Zenith*, 401 U.S. at 332-33 (recognizing relevance of delay in seeking amendment as a basis for denial of leave).

The district court, in any event, properly concluded that allowing CSI's proposed amendment would be "highly prejudicial to defendants." (App. F 84a) *See Zenith*, 401 U.S. at 330-31; *Barrows* v. *Forest Laboratories, Inc.*, 742 F.2d 54, 58-59 (2d Cir. 1984). As the district court knew, two-and-a-half years of discovery had focused on actual malice. That Time's summary judgment motion could be case-dispositive had obviously been a shared belief: the parties had expressly agreed that discovery on truth and falsity would occur only "[i]f the summary judgment motion is not granted . . . ." (A136)

The district court did not abuse its discretion in denying CSI's motions as untimely and unjustified, and the Petition should be denied for this reason.[19]

---

[18] CSI had previously acknowledged the applicability of the actual malice requirement. *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Jan. 16, 1995: "[A]t trial plaintiff will have to prove by clear and convincing evidence that defendants published the statements at issue with actual malice. . . ." (p. 8).

[19] While Petitioner states that the "court of appeals rejected CSI's argument on this point *on the merits*" (Pet. 25 n.22, emphasis in original), it does not follow that the Court of Appeals' single footnote reference to the issue (App. A 16a n.3) reflected a rejection of the procedural grounds relied upon by the district court and presented to the Second Circuit. It certainly provides no basis to ignore those glaring procedural deficiencies in considering the appropriateness of review by this Court. The Court of

Footnote continued on next page.

There is, in any event, no basis for a "nominal damages" exception to the rule requiring proof of actual malice in a public figure libel action. CSI has admitted that it is a public figure. Thus, as a matter of federal constitutional law, CSI may not recover for injury to its reputation without presenting clear and convincing proof that Time's allegedly defamatory statements were published either with knowledge of falsity or with reckless disregard for the truth. *Sullivan*, 376 U.S. at 279-80; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In *Sullivan* and its progeny this Court articulated a constitutional privilege, grounded in the First Amendment, which limits the states' application of their libel laws to guard against the chill of self-censorship. CSI asks this Court to carve out a sweeping exception to the constitutional privilege—an exception that would allow a public figure plaintiff who seeks only nominal damages to recover without proving actual malice. The Second Circuit rejected CSI's proposed exception, there is no conflict in the lower courts on this issue, and no court has ever adopted the "interpretation" of *Sullivan* proposed by the Petition.

The fundamental premise of CSI's argument is that when this Court announced the constitutional privilege in *Sullivan* and defined its boundaries in subsequent cases, it was attempting only to avoid a chilling effect caused by "ruinous damage liability" or "substantial damage awards." (Pet. 27, 28) CSI reads *Sullivan* far too narrowly. Without the protection of the constitutional privilege, the burden and expense of defending a libel claim would create a powerful in-

---

Footnote continued from previous page.

Appeals' minimal discussion of the issue, particularly in the absence of discussion by any other circuit court, also suggests that the matter is "not . . . sufficiently developed below" for this Court to review. *Roberts* v. *Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

centive for the press to engage in self-censorship, particularly when the claim is asserted by a litigant eager to harass a media defendant into self-censorship. As this Court has said:

> "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, *even fear of expense involved in their defense*, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'" *Time Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) (emphasis added) (quoting *Sullivan*, 376 U.S. at 279).[20]

Even in a case—notably unlike this one—where the plaintiff elected at the start of litigation to seek only nominal damages, the risk of self-censorship would be unacceptable.[21]

None of CSI's cases supports the claim that a public figure may prevail in a libel case absent proof of actual malice, and there is no occasion for this Court to embark on a journey the lower courts have yet to even consider.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

---

[20] The Petition contends that this Court limited the rationale for *Sullivan*'s actual malice rule to protection against "ruinous damages" in *Herbert* v. *Lando*, 441 U.S. 153, 175-77 (1979) and rejected any concern about the cost of libel litigation. (Pet. 27 n.26) But the *Lando* discussion goes no further than to illustrate the point that the burdens inherent in the actual malice rule are a necessary concomitant of the protections it affords.

[21] As Judge Leisure pointed out, a federal court would, in any event, have no independent jurisdictional basis to hear the nominal damages claim CSI proposed to add, and the exercise of supplemental jurisdiction over a novel claim would be inappropriate. App. F 85a-86a.

Dated: New York, New York
July 9, 2001

Respectfully submitted,

FLOYD ABRAMS*
DEAN RINGEL
JANET A. BEER

CAHILL GORDON & REINDEL

New York, New York 10005
(212) 701-3000

*Attorneys for Respondents*

* *Counsel of Record*

*Of Counsel:*

ROBIN BIERSTEDT
TIME INC.
1271 Avenue of the Americas
New York, New York 10020